No. 13,934

IN THE

United States Court of Appeals

For the Ninth Circuit

DON MAURICE RANDALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The statement set forth in appellant's brief relative to jurisdiction is correct.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellant while dealing primarily with facts most advantageous to appellant's position is, for the most part, accurate and correct.

It should be pointed out, however, that David E. Thompson testified that defendant and the blonde woman were engaged in an argument (TR 30); that defendant tried to force the woman to take a double shot (TR 30); that they then went outside and argued; that she came back in crying and said, "Just leave me alone." (TR 30); that when the defendant pulled the gun on the bartender, the bartender put up his hands and served the drink (TR 31).

STATEMENT OF POINTS RELIED ON.

1. The Court did not abuse its discretion in denying defendant's motion for a continuance.

2. The Court did not err in admitting the testimony of the witnesses David E. Thompson and Patricia Ann Herrick that they thought the gun was loaded.

3. The Court did not err in admitting the testimony of Dr. James E. O'Malley.

4. The Court did not err in submitting to the jury the charge of assault with a dangerous weapon.

5. The Court did not err by failing to instruct on circumstantial evidence or by failing to give defendant's requested instruction number 1.

ARGUMENT.

POINT ONE.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A TRIAL CONTINUANCE.

The trial court heard arguments on the two written motions for continuance filed by defendant. Although the transcript of those two arguments is not before this Court, the minute orders denying the motions are a part of the record (TR 7, 10, and 11). Both motions were denied by the trial Court on the ground that the affidavits were insufficient. The statements of defendant's doctors that the defendant developed a "tendency toward forgetfullness" (TR 6) or that the defendant "complained of marked nervousness, anxiety and apprehension" (TR 8) might well apply to any person faced with the possibility of standing trial on a criminal charge. The trial Court had an opportunity to observe the defendant on the morning the trial began and at that time denied the motion. The cases cited by appellant correctly state the law and the Appellate Court did not reverse in any one of the cases for an abuse of discretion. The controversion of the showing that defendant was not prepared to go to trial must have been made at the hearings on the motions. There has been no showing of an abuse of the discretion vested in the Trial Court.

POINT TWO.

THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE WITNESSES DAVID E. THOMPSON AND PATRICIA ANN HERRICK THAT THEY THOUGHT THE GUN WAS LOADED.

Appellant points out that the witnesses Thompson and Herrick were permitted to testify that they thought the gun was loaded. It should first be observed that no objection was made to this testimony. Rule 51, Federal Rules of Criminal Procedure, 18 U.S.C.A. provides in part as follows:

> "* * * for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor; * * *"

The defendant completely failed to make any objection to the above testimony and cannot now urge that his conviction be reversed unless it is made to appear that the admission of the evidence was an error of such magnitude as to deprive defendant of substantial justice. Law v. U.S., (5th) (Cir.) 1949; 177 F 2d 283. No substantial error exists in this case since the jury had ample evidence before it from which the inference could be drawn that the gun was loaded. That evidence will be considered in detail in assignment of error number four.

Appellant, perhaps in endeavoring to explain his failure to object to the above questions when put to

the witnesses Thompson and Herrick, states that the same question was put to the witness Abernathy, and that the defendant's objection was overruled. It should also be noted, however, that the witnesses Thompson and Herrick testified before Abernathy, and that the objection was first urged when the third witness was testifying. In addition, the objection made to the question asked of Mr. Abernathy was "that it was an improper question." General objections of that type cannot avail the objector on appeal. Wigmore, Vol. 1, Section 18, Page 332.

The nebulous differences in the decisions resulting from the efforts of the Courts to adequately distinguish between opinion evidence and fact evidence are discussed in Wigmore on Evidence, Third Edition, Vol. VII, Sections 1917-1929. If the witnesses had been asked, "was the gun loaded?", they would have been permitted to answer, as they did in response to the question asked, with all of the facts they had observed. Those facts are (1) that the weapon had been concealed (2) that the clip was in and ready for action (3) the circumstances surrounding the way in which defendant used the gun. The appellant is therefore urging that the form of the question which was asked without objection from the defendant, is such a substantial error that reversal should follow.

The quoted passage relied on by appellant in the case of Brown v. U. S. (C.A.D.C.), 152 F 2d, 138 was not at all essential to the Court's decision and the Court so stated in the following sentence.

The question asked of the witnesses Herrick, Thompson, and Abernathy, was simply, "Was the gun loaded?" The question of whether the gun was loaded is a fact about which the witnesses could testify if they had knowledge. The witnesses testified that the gun was loaded. On cross-examination, defense counsel showed that the witnesses did not have any knowledge on that point. No substantial or prejudicial error resulted from the above question since defendant did not object. If the objection to the question put to Abernathy should have been sustained, there was still sufficient evidence for the case to be submitted to the jury, and there was no prejudicial error.

POINT THREE.

COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF DR. O'MALLEY.

Dr. O'Malley was not testifying as a ballistics expert. He testified that the wound was a gunshot wound rather than a wound received from the tailgate of a truck. He testified that the wound was caused by a pistol of either .25 caliber or approximately .25 caliber. That testimony is not that of a ballistics expert but that of a doctor. A doctor could testify that the wound, from his experience, was caused by a gunshot. His qualifications to testify as an expert as to medical facts were waived by the defendant.

The practical and sensible test for receiving opinion testimony is discussed in Wigmore on Evidence, Vol. 7, Section 1923, page 21:

> "But the only true criterion is: On this subject can a jury draw from this person appreciable help. In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally."

The cases cited by appellant represent the subtleties and refinements of the Opinion rule, which are legion. The short answer is that Dr. O'Malley testified originally only as to the fact that the wound was caused by a gun. The subsequent testimony that it was a .25 caliber gun which caused the wound was volunteered by the witness and appellant made no motion to strike the testimony, and therefore cannot complain on appeal, that the testimony should have been excluded.

POINT FOUR.

COURT DID NOT ERR IN SUBMITTING TO JURY THE CHARGE OF ASSAULT WITH A DEADLY WEAPON SINCE THERE IS NOT SUFFICIENT EVIDENCE THAT THE GUN WAS LOADED.

The argument of appellant that the case should not have been submitted to the jury overlooks the fact that defendant failed to make a motion for judgment of acquittal before the case was submitted to the jury, as provided in Rule 29, Federal Rules of Criminal Procedure, Title 18 U.S.C.A. The sufficiency of the evidence to sustain conviction is not reviewable on appeal where no motion for a directed verdict was made in the District Court. That principle has long been established law.

As stated by the Court in *Colt v. U. S.,* 160 F. 2d 650 (C.A. 5th):

> "In the conspiracy case no motion for a directed verdict was made in the lower court, and therefore, the sufficiency of the evidence is not here reviewable under the well established rule which defendant's present counsel candidly recognizes."

See also *Cratty v. U. S.,* 163 F. 2d 844, headnote 9, where the Court states that where defendant did not make a motion for directed verdict, he was precluded from complaining that the trial Court erred in failing to direct a verdict in his favor.

The law in Alaska has been, since 1900, that the question as to whether the gun was loaded is a question for the jury. We shall quote at length from the well-reasoned opinion of Justice Hawley of this Court in the case of *Jackson v. U. S.,* 102 F. 473 at page 485 (emphasis supplied):

> "The remaining point, that there was no evidence that the revolver was loaded is equally without merit. *It is true that there was no positive or direct evidence that it was loaded. How could there be? It was not discharged. Jackson kept possession of it,* and got away as speedily as possible after Smith was shot. Whether it was loaded or not was a question of fact, to be determined by the jury. The testimony was circumstantial. *The jury had to infer the fact from all the testimony and the surrounding circumstances. What was the object or purpose of Smith and his associates* in going down to the wharf? *What was*

> *the natural inference to be drawn from the acts and conduct of Jackson* at or about the time he drew and pointed his gun at Tanner? *The jury heard this testimony, and were authorized to draw the inference therefrom* that Jackson's revolver was loaded."

Similar reasoned decisions are found in *Territory v. Gomez* (S.C. Ariz.) 125 P. 702; *People v. Montgomery* (S.C. Calif.) 114 P. 792, and other cases. See annotation 74 A.L.R. 1206.

The jury in this case must have found that the gun was loaded. There was sufficient circumstantial evidence from which that inference could be drawn: the fact that the weapon had been concealed; the fact that defendant said, "Are you going to give her a drink, or do I have to whip you?"; the fact that defendant had been drinking quite a bit and was mad; the fact that defendant whipped out a gun and threatened the bartender; the fact that the clip was in the gun. The jury had an opportunity to observe the witnesses and the defendant, even though he did not testify.

As the Court stated in the *Jackson* case, supra, how could there be direct evidence that the gun was loaded if the government failed to get the gun immediately after the assault?

One further point should be mentioned and is urged only to show the illogicalness of the theory that the government must show that the gun could have been fired. The doctrine becomes rather far-fetched

if the government must prove (1) that the cartridge in the chamber at the time of the threat had an ignitable primer, (2) that the powder was dry, (3) that the gun was not in a faulty mechanical condition, (4) that the barrel was not plugged, etc. We contend that a gun is inherently dangerous and that the burden of showing that the gun was unloaded should rest on the defendant because those facts are within his peculiar knowledge, especially where the gun is not recovered, which is the case here.

POINT FIVE.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS.

The Court correctly stated the law of Alaska as set out in the *Jackson* case, supra. Instruction No. 1 states that the question as to "Whether it (the gun) was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say." Defendant's requested Instruction No. 1 conveys the impression that the government must prove that the gun was in fact loaded, which is not the law.

The Court's first three instructions are not confusing, misleading, and inconsistent as urged by appellant. They are in fact simple and concise, and cover the law applicable to the case.

The appellant insists that the instruction number three is misleading, since it is urged the Court didn't

make it clear whether simple assault or assault with a dangerous weapon was being discussed. The whole instruction is obviously devoted to simple assault and is perfectly clear.

The appellant urges that the Court erred in failing to instruct on circumstantial evidence, although appellant admits that no such instruction was requested. A brief reference to Rule 30, Federal Rules of Criminal Procedure, Title 18, U.S.C.A., which states that "no party may assign as error any portion of the charge—unless he objects thereto," should suffice to overcome appellant's contention. However, the two cases cited by appellant, *Samuel* and *Morris* cases, are clearly distinguishable. In those two cases the essence of the charge was a violation of a regulation, which had to be brought to the attention of the jury. See *Todorow v. U. S.* (Cir. 9) 173 F 2d 439.

In addition, the trial Court stated in the quoted portion of instruction number 1 above, that the jury could infer that the gun was loaded from all the surrounding facts and circumstances. No instruction on circumstantial evidence was warranted since defendant failed to request one.

CONCLUSION.

None of the matters complained of by appellant in the trial of this case constituted error; if it could be so construed certainly they did not constitute prejudicial error.

An examination of all the testimony when reduced to its simple factor will reveal that the only question was whether defendant made the assault and if the jury could infer from all the facts and circumstances that the gun was loaded. In this respect the jury having heard all the evidence, decided against the appellant. The verdict of the jury should not be set aside.

Dated, Anchorage, Alaska,
March 31, 1954.

Respectfully submitted,

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